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No. 89-24

In the Supreme Court of the United States

OCTOBER TERM, 1989

MARY DANN AND CARRIE DANN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's payment of an Indian Claims Commission judgment awarding compensation for the extinguishment of tribal title to certain lands bars individual Indians from asserting tribal title as a defense in a trespass action involving the lands.

2. Whether petitioners were inadequately represented in the Indian Claims Commission proceeding.

3. Whether tribal title to the lands was extinguished in 1872 or in 1979.

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OPINIONS BELOW AND PRIOR OPINIONS

The amended opinion of the court of appeals (Pet. App. 1-25) is reported at 873 F.2d 1189. The findings of fact and conclusions of law of the district court (Pet. App. 26-36) are not reported. A prior opinion of this Court in this case is reported at 470 U.S. 39. The prior opinions of the court of appeals are reported at 763 F.2d 379, 706 F.2d 919, and 572 F.2d 222.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1989. A timely petition for rehearing was denied on April 27, 1989, and an amended opinion was entered that same day (Pet. App. 1-2). The petition for a

writ of certiorari was filed on July 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The lands involved in this case are part of a much larger area which was at issue in an action resolved by the Indian Claims Commission in 1977.[1] That action was filed in 1951 on the behalf of various Shoshone tribal groups to recover damages for the loss of aboriginal title to lands in the Western United States, including Nevada. The Temoak Band of Shoshone Indians was recognized by the Commission as the tribal representative for the purpose of maintaining a claim on behalf of the Western Shoshone for damages for the extinguishment of tribal title to lands in Nevada and California, including the lands at issue here. Following stipulation to a valuation date of July 1, 1872, the Commission determined the fair market value of the lands acquired from the Western Shoshone to be $21,550,000. *Western Shoshone Identifiable Group* v. *United States*, 29 Ind. Cl. Comm. 5 (1972).

The Western Shoshone Legal Defense and Education Association, an organization supported by petitioners, subsequently moved to stay the proceedings and present an amended claim. Specifically, the Association sought to delete from the claim lands to which it contended the Western Shoshone still retained aboriginal title. The Commission, "viewing the dispute as an internal one among the Western Shoshone over litigation strategy" (Pet. App. 4), denied the untimely motion. *Western Shoshone Legal Defense & Education Ass'n* v. *United States*, 35 Ind. Cl.

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[1] The Indian Claims Commission Act authorized the Commission to hear and determine claims for damages for the taking of aboriginal land brought on behalf of any "Indian tribe, band, or other identifiable group of American Indians." § 2, 25 U.S.C. 70a (1976).

Comm. 457 (1975), aff'd, 531 F.2d 495 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

The Temoak Band, which had opposed the Association's motion to stay the Commission proceedings, then reversed its position and sought to stay the Commission's proceedings pending a determination of claims that the Western Shoshone retained aboriginal title to lands in Nevada. The Commission denied the motion and, in 1977, entered final judgment, awarding the Western Shoshone more than $26 million. *Western Shoshone Identifiable Group* v. *United States*, 40 Ind. Cl. Comm. 305, 311, 453 (1977). The Court of Claims affirmed (*Temoak Band of Western Shoshone Indians* v. *United States*, 593 F.2d 994 (1979)), and this Court denied a petition for a writ of certiorari (444 U.S. 973 (1979)).

2. The United States commenced this grazing trespass action in 1974, alleging that petitioners were grazing livestock on certain public lands in Nevada without a federal permit as required by regulations issued by the Secretary of the Interior pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Petitioners defended on the basis that they were Western Shoshone Indians and the tribe was the beneficial owner of the lands at issue. Pet. App. 2.

In 1980, after the Indian Claims Commission's judgment had become final, the district court ruled that the effect of that judgment was to extinguish Western Shoshone aboriginal title as of December 19, 1979, the date on which the Clerk of the Court of Claims had certified the Commission award to the General Accounting Office for payment. The court further ruled that petitioners had not been trespassing before that time. See 706 F.2d 919, 923 (1983).

The court of appeals reversed. Although Section 22 of the Indian Claims Commission Act, 25 U.S.C. 70u (1976), provides that the payment of any claim determined under

the Act "shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy," the court held that petitioners' aboriginal title claims were not barred because "payment" of the claim had not yet occurred. *United States* v. *Dann*, 706 F.2d 919 (9th Cir. 1983). The panel concluded that "payment" for the purposes of Section 22 would not occur until "Congress has taken its final look at the award and has either permitted a plan of distribution to become effective pursuant to 25 U.S.C. § 1403 or has legislated one." 706 F.2d at 926.

This Court reversed. *United States* v. *Dann*, 470 U.S. 39 (1985). Noting that the two fundamental purposes of the Indian Claims Commission Act were " 'to dispose of the Indian claims problem with finality' " (*id.* at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)) and to transfer from Congress to the Commission "the responsibility for determining the merits of native American claims" (470 U.S. at 45), the Court held that "payment" under Section 22 was effected when the award was placed in a trust account for the benefit of the Western Shoshone. The Court added: "The Danns also claim to possess individual as well as tribal aboriginal rights and that because only the latter were before the Indian Claims Commission, the 'final discharge' of § 22(a) does not bar the Danns from raising individual aboriginal title as a defense in this action. Though we have recognized that individual aboriginal rights may exist in certain contexts, this contention has not been addressed by the lower courts, and, if open, should first be addressed below. We express no opinion as to its merits." 470 U.S. at 50 (footnote omitted).

3. On remand, the district court allowed petitioners to file an amended complaint in which they again asserted tribal title to the lands and also maintained individual aboriginal claims. The government then moved for a pre-

liminary injunction to compel petitioners to remove all livestock from the disputed lands in excess of the number which they had formerly been permitted to graze under a federal grazing permit.

The district court rejected petitioners' tribal claim. It explained that they "are precluded from asserting the aboriginal title of the Western Shoshone Nation against the United States because of the effect of section 22(a) of the Indian Claims Commission Act resulting from the payment, on December 19, 1979, of the judgment" resulting from the proceeding before the Commission. Pet. App. 33.

As to individual aboriginal title, the court ruled that such rights were "established prior to December 19, 1979," although it added that "any subsequent effort by individual Western Shoshones to extend their individual occupancy or use could not extend the scope of established use and occupancy rights." Pet. App. 33. The court held that petitioners, in their own rights, "have established an individual aboriginal and treaty right to graze 598 head of cattle, plus calves, and 840 head of horses, plus foals, in common with permittees of the Bureau of Land Management upon the public domain." *Id.* at 34. Similarly, the court also held that petitioners, as beneficiaries of their father's estate, have "individual aboriginal and treaty rights, in common with the other heirs, to graze an additional 170 head of cattle, plus calves, and 10 head of horses, plus foals, upon the public domain in common with permittees of the Bureau of Land Management." *Id.* at 34-35. Such grazing rights were not subject to regulation by the Bureau of Land Management (BLM), the court added. *Id.* at 35. Petitioners were directed, however, to remove livestock in excess of the numbers allowed by the court's decision. *Ibid.*

4. Both sides appealed, and the court of appeals affirmed in part and reversed in part. Pet. App. 1-25. The

court first rejected petitioners' tribal title claims (*id.* at 9-12) because Section 22(a) of the Indian Claims Commission Act provides that payment resolves "all claims and demands touching any of the matters involved in the controversy." The court noted that it "would have thought that the Supreme Court's decision would have shifted the focus of this case away from tribal aboriginal title and placed it squarely on individual aborginal title." Pet. App. 9. In any event, the court held, its prior opinion in *United States* v. *Gemmill*, 535 F.2d 1145, 1149 (9th Cir.), cert. denied, 429 U.S. 982 (1976), compelled the conclusion that Section 22(a) precludes petitioners from continuing to assert Western Shoshone aboriginal title following payment for the lands. Pet. App. 10.[2]

Turning to the individual aboriginal title issue, the court rejected the government's position that petitioners could not establish title. Relying upon *Cramer* v. *United States*, 261 U.S. 219 (1923), it ruled that the government's former policy of favoring individual Indian settlement on the public lands allowed individual Indians to acquire rights in those lands from the date upon which tribal title was extinguished until November 26, 1934, when the lands at issue were withdrawn from further entry pursuant to the Taylor Grazing Act. Pet. App. 17-19. Relying upon the Commission proceedings, the court concluded that "the most appropriate date for the extinguishment of tribal title to the lands" was July 1, 1872. *Id.* at 20. Consequently, overruling the district court's adoption of the 1979 date for

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[2] The court of appeals also held that Section 22(a) similarly barred petitioners from claiming any tribal rights under the Treaty of Ruby Valley (Treaty with Western Bands of Shoshonee Indians), Oct. 1, 1863, 18 (Pt. 3) Stat. 689, because "the Treaty of Ruby Valley conferred no individual rights." Pet. App. 24. It also noted that "the Treaty does not refer to grazing rights." *Ibid.*

determining the extent of petitioners' individual aboriginal title rights to graze cattle and horses on range lands, the court of appeals ruled that "[a]ny such aboriginal right * * * must have been acquired prior to the withdrawal of the lands from open grazing and their subjection to the regime of the Taylor Grazing Act" in 1934, and "must have been continuously exercised since that time." *Id.* at 22. Accordingly, the court of appeals concluded that "[t]he individual aboriginal land title of [petitioners] is restricted to land that they or their lineal ancestors who preceded them in interest actually occupied prior to November 26, 1934," and that any such grazing rights are restricted to the number and type of animals which were being grazed in 1934. *Id.* at 24-25.[3] The court of appeals remanded the case to the district court to make the requisite findings and enter a decree.

ARGUMENT

The court of appeals correctly resolved the questions petitioners present for review. The court of appeals' resolution of those issues does not conflict with any decisions of this Court or of any other court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. Petitioners assert (Pet. 15-17) that they may raise Western Shoshone tribal title as a defense in this grazing trespass action, notwithstanding this Court's determination in *United States* v. *Dann* that the United States has paid the Indian Claims Commission judgment awarding the Western Shoshone compensation for the lands at issue. The court of appeals properly rejected this contention.

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[3] The court also found that the exercise of petitioners' individual aboriginal grazing rights would be subject to reasonable regulation by BLM. Pet. App. 23.

Section 22(a) of the Indian Claims Commission Act, 25 U.S.C. 70u(a) (1976), provides in relevant part: "The payment of any claim, after its determination in accordance with this [Act], shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." In 1983, the court of appeals ruled that "the bar arising from a favorable claim determination takes effect upon the payment of the claim, pursuant to section 70u(a)" (706 F.2d at 925), but found that the claim had not yet been paid. This Court reversed, finding that the claim had been paid within the meaning of Section 22(a). 470 U.S. 39 (1985). The clear effect of this Court's ruling, in light of the context in which it was rendered, is that Western Shoshone tribal title may no longer be asserted against the United States under any circumstances.

Petitioners observe that most of this Court's discussion in its prior opinion focused on whether payment had occurred rather than on the effect of payment. But, as the court of appeals noted, "the Court's discussion did not take place in a vacuum." Pet. App. 9. Since the court of appeals had already concluded that payment of the claim would bar any further assertion of tribal title, there was no reason for this Court to address that matter in detail. Indeed, the preclusive effect of payment of a Commission judgment is plain from the face of Section 22(a)—such payment acts as "a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." Moreover, to allow any party to continue to assert Western Shoshone tribal title to the lands in question after payment of the Commission judgment, as petitioners seek to do here, would defeat the "chief purpose" of the Indian Claims Commission Act, which was, this Court found, " 'to dispose of the Indian claims problem with finality.' " *United States* v. *Dann*, 470

U.S. at 45 (quoting H.R. Rep. No. 1466, 79th Cong., 1st Sess. 10 (1945)).

2. There is no merit to petitioners' contention (Pet. 18-21) that the application of Section 22(a) to bar their claims of tribal ownership violates due process. The claim that was the subject of the Commission proceedings was a collective tribal claim, not an aggregation of related individual claims on behalf of a class of similarly situated persons. Hence, petitioners were not entitled to be individually represented in the Commission proceedings. See 531 F.2d at 503-504.

Petitioners maintain that the Temoak Band should not have been recognized as the appropriate representative party for maintaining a claim in the Commission proceedings on behalf of all Western Shoshone. Like the underlying aboriginal title issue, however, that question was fully litigated in the Commission action. The Western Shoshone Legal Defense and Education Association, an organization with whom petitioners were affiliated (706 F.2d at 922), sought to intervene in those proceedings to challenge the Temoak Band's status as the representative party and to assert allegations that the Western Shoshone had been misled concerning the claim. The Court of Claims, however, affirmed the Commission's denial of the petition, finding the Temoak Band to be the appropriate representative of the entire Western Shoshone and that the Association's allegations of fraud and collusion were unfounded. The court also rejected the Association's due process challenge to the constitutionality of the Indian Claims Commission Act (531 F.2d at 497-504), and this Court denied a petition for a writ of certiorari (429 U.S. 885 (1976)). In short, petitioners' contentions regarding the alleged lack of due process in the Commission proceedings have already been fairly and fully litigated in

those proceedings, so those contentions may not be relitigated here.

Furthermore, as the Court of Claims twice emphasized, its orders denying intervention and, later, barring the Temoak Band's efforts to alter its litigation position, rested upon the unjustified tardiness of the procedural maneuvers; those orders were not based upon any unwillingness to consider a representational dispute timely presented or to allow an Indian group to contend that it still retained title to ancestral lands. 531 F.2d at 498-499 & n.6, 502-503 & nn.13, 14, 504 & n.18; 593 F.2d 994, 997-999. Especially in light of the Court of Claims' determination that "no adequate excuse was offered for the long delay" (593 F.2d at 997 (see also 531 F.2d at 498-499, 501-502 & n.13)), neither the Commission's procedural rulings nor the preclusive effect which Congress has assigned to the judgment of the Commission offends due process.

3. Finally, petitioners contend (Pet. 21-26) that the court of appeals erred by concluding that the most appropriate date to be adopted as the date that tribal title to the lands in question was extinguished is July 1, 1872. However, because the representative party of the Western Shoshone stipulated to that date in the claims proceeding, that stipulation should also be given effect here. Contrary to petitioners' contention, the Commission award could not result in an extinguishment date of December 17, 1979, as the Commission did not have jurisdiction to award compensation for lands taken after August 13, 1946. See 706 F.2d at 928.

In any event, the alleged error worked in favor of petitioners here. If the extinguishment date were found to be 1979, petitioners still would be precluded from now asserting tribal title and, in addition, would be unable to assert any individual claims as well. As the court of appeals stated

(Pet. App. 21), individual aboriginal title may be established, if at all, only with the implied consent of the government and only after tribal title has been extinguished. The government's implied consent to the individual acquisition of the lands in question, however, was recalled when the subject lands were withdrawn pursuant to the Taylor Grazing Act in 1934. Hence, if tribal title continued to exist after 1934, as petitioners maintain, the lands would at no time have been available for individual aboriginal occupancy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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